Whistleblower Protection Authority Bill 2025 (No.2)
Submission 39 - Attachment 3

Making Australian Whistleblowing Laws Work

Draft Design Principles for a Whistleblower Protection Authority

TRANSPARENCY INTERNATIONAL AUSTRALIA
Human Rights Law Centre
Griffith UNIVERSITY

Transparency International Australia
Transparency International Australia is the national chapter of Transparency International, a global coalition against corruption operating in over 100 countries. Each chapter is independent and unique, and together we aspire to a unified vision: a world free of corruption. Our mission is to tackle corruption by shining a light on the illegal practices and unfair laws that weaken our democracy, using our evidence-based advocacy to build a better system.

Human Rights Law Centre
The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. Whistleblower protections are an essential part of the wider human rights framework in this country, underpinned by Australia's international obligations. Whistleblowers play an important role in upholding Australia's transparent, accountable democracy and ensuring governments and corporations respect and uphold human rights. In 2023, we launched the Whistleblower Project, Australia's first dedicated legal service to protect and empower whistleblowers who want to speak up about wrongdoing. The Human Rights Law Centre is also a member of the Whistleblowing International Network.

Centre for Governance and Public Policy
The Centre for Governance and Public Policy at Griffith University is an outstanding intellectual environment for world-class research engaging international scholars and government and policy communities. We examine and critique the capacity, accountability and sustainability of the public service and government, providing insights into improved management structures. Working closely with governmental and non-governmental partners, we are making a tangible mark on governance research.

The authors acknowledge the Traditional Owners of Country throughout Australia and recognise their continuing connection to land, waters, and culture.

We pay respect to elders and acknowledge the Traditional Owners who have cared for Country since time immemorial. Sovereignty over this land was never ceded – it always was, and always will be, Aboriginal and Torres Strait Islander land.

February 2024

Rawan Arraf, from the Australian Centre for International Justice, calls for stronger whistleblower protections.

Summary

Draft Design Principles for a Whistleblower Protection Authority

A Whistleblower Protection Authority would be a new, dedicated statutory agency or office which will make Australia's federal whistleblowing laws work. The Whistleblower Protection Authority would do this by enforcing improved legal protections for people from inside agencies or organisations who raise concerns about wrongdoing under federal laws; providing support, information and assistance to prospective, current and former whistleblowers; facilitating receipt and referral of whistleblowing disclosures; investigating and addressing complaints of unfair treatment; and playing an important role in monitoring, advocacy and outreach in support of integrity, accountability and fair treatment of those who speak up. Right now, a Whistleblower Protection Authority is the missing piece of Australia's integrity landscape.

These draft design principles, jointly developed by Transparency International Australia, the Human Rights Law Centre, and Griffith University's Centre for Governance & Public Policy, provide a basis for policy dialogue to inform the design and establishment of the new body.

Our principles are grouped around the 10 key concepts:

1	Pro-protection purpose
2	Support
3	Prevention
4	Remedies focus
5	Mediation & administrative redress
6	Legal actions
7	Rewards, compensation & financial support
8	Comprehensive, seamless jurisdiction
9	Adequate powers & resources
10	Independence

A Time for Reform

Australia's whistleblower protection laws are crucial for protecting public integrity, and ensuring all our decision-makers and institutions are upholding the highest standards of good governance and ethical behaviour.

These Draft Design Principles set out a detailed proposal for how to fill the biggest missing link in our federal whistleblower protection systems – a dedicated, independent agency or office to actually enforce these vital protections, and make the systems work.

No regulatory system is ever entirely self-enforcing. Australia currently has at least seven different sets of whistleblower protections operating under Commonwealth laws, including the best known *Public Interest Disclosure Act 2013*, covering the federal public sector. As well, there are public sector whistleblower protections operating in each State and Territory.

But while we have tried different systems for administering these laws over the last 30 years, we now know that without strong and capable central enforcement, the protections will simply not be applied in the cases where they are most needed.

Research shows that too many Australian whistleblowers continue to experience retaliation or unfair treatment for speaking up, too much wrongdoing is going unreported because of the lack of support, and current legal protections are inaccessible and making no difference. There has been just one award of compensation under any of Australia's dedicated whistleblowing laws over the past three decades.

The Draft Design Principles for an Australian Whistleblower Protection Authority are a key step to finding the answer – setting out a comprehensive outline of what is needed to ensure Australia's federal whistleblowing laws work in practice.

Key Submissions

These Draft Design Principles were first presented to the Australian Government in December 2023 as part of Transparency International Australia's submission to the Attorney-General Department's consultation into the next phase of whistleblowing reform. The Draft Design Principles were also discussed and endorsed in submissions by Griffith University and the Human Rights Law Centre.

Image credit: Amanda Smith

Using these Principles

The Draft Design Principles for a Whistleblower Protection Authority were developed jointly in late 2023 by Transparency International Australia, the Human Rights Law Centre and Griffith University with input from distinguished experts with direct experience of all aspects of whistleblowing, including former senior public servants, whistleblowing hotline providers, expert practitioners from private law firms, and Transparency International Australia corporate members including representatives from mining, finance and professional services.

Most importantly, the Principles have had input and support from members of Transparency International Australia's national whistleblowing advisory group – with direct personal experience of bringing about positive change for integrity and accountability, through the often difficult process of blowing the whistle.

These are **draft** design principles – we encourage input and discussion among policy, civil society, legal, regulatory and political stakeholders to arrive at the right final design principles for reform.

In addition to the Attorney-General's ongoing second phase of reform to the *PID* Act, for the federal public sector and all public contractors, these principles are crucial for the Commonwealth Government's wider whistleblowing reform agenda. There are currently reform processes underway to improve protections for tax-related whistleblowers and whistleblowers in aged care, while the Corporations Act protections for all private sector whistleblowers will be reviewed in 2024. The time is right for discussion about how best to enforce comprehensive, consistent and accessible protections for all whistleblowers under Australian law.

Context

There is a strong consensus among diverse stakeholders and experts that it is time for a dedicated federal body to protect whistleblowers in the public sector, and beyond.

A federal whistleblowing authority was first recommended by the unanimous, bipartisan Senate Select Committee on Public Interest Whistleblowing in 1994, chaired by Liberal Senator Jocelyn Newman.

On their slow road to public sector whistleblower protections in 2013, and private sector whistleblower protections in 2004 and 2019, Commonwealth governments have tried various initial institutional arrangements to support the protection regimes. But in 2017, the landmark review by the bipartisan Parliamentary Joint Committee on Corporations and Financial Services, into federal whistleblower protections across the corporate, not-for-profit and public sectors, was clear that a simpler approach based on the original idea, was both right and feasible. The Joint Committee unanimously recommending 'a one-stop shop Whistleblower Protection Authority be established to cover both the public and private sectors.'

Following the analysis in Transparency International's assessment of Australia's national integrity system, Independent MP Cathy McGowan included a strong whistleblower protection commissioner in her *National Integrity Commission Bill 2018*, showing how easily it could be legislated.

In fact, the same proposal was introduced by the Australian Greens, where it passed the Senate in 2019; as well as by Dr Helen Haines MP in her "gold standard" *Australian Federal Integrity Commission Bill* 2020.

In the end, the Albanese Government's National Anti-Corruption Commission, established following the 2022 election, did not contain a whistleblower protection commissioner. But the idea has a history of strong support within the Government – for example, in the Australian Labor Party's election commitment in 2019 to:

> *strengthen protections for whistleblowers through the establishment of a Whistleblower Protection Authority a one-stop-shop to support and protect whistleblowers. The Authority will have dedicated staff to advise whistleblowers on their rights, assist them through the disclosure process and help them access compensation if they face reprisals.*

In November 2022, members of every political party in the Australian Parliament helped launch *Protecting Australia's Whistleblowers: The Federal Roadmap*. This report from Griffith University, Human Rights Law Centre and Transparency International Australia set out the 12 areas for reform of Australia's national whistleblowing landscape, with establishment of a whistleblower protection authority as the first, key area.

There is now a groundswell of support for the establishment of such an authority. Business groups, the Law Council of Australia, Centre for Public Integrity and The Australia Institute have voiced their support for the idea. In September 2023, 30 members of the House of Representatives and the Senate crossbench wrote to the Albanese government urging it to commit to establishing a whistleblower protection commission.

2024 marks 30 years since the first Senate Select Committee on Public Interest Whistleblowing recommended an independent whistleblower protection authority (or Public Interest Disclosures Agency) to 'receive public interest disclosures and arrange for their investigation by an appropriate authority, to ensure the protection of people making such disclosures,' and other functions. Thirty years on, experience shows it is the missing piece of Australia's transparency and integrity landscape – an idea whose time has come.

Above: Anti-corruption whistleblower Sharon Kelsey, former CEO of Logan City Council, whose case highlighted the need for every government to have an independent whistleblower protection office.

Draft Design Principles for a Whistleblower Protection Authority

1. Pro-Protection Purpose

The Whistleblower Protection Authority **(WPA)** should be a Commonwealth statutory agency to:

a. **enforce** public interest whistleblower protections in federal laws,

b. provide **support, information and assistance** to current, former, and prospective public interest whistleblowers, as well as general assistance to organisations,

c. investigate, and ensure remedies in response to, alleged **detrimental treatment** of whistleblowers, and

d. **support** other federal integrity and regulatory agencies, and relevant state-based authorities, in the receipt, assessment, referral and response to whistleblowing disclosures.

2. Support

The WPA should provide **information and advice** to prospective whistleblowers, and case worker-style **advice and support** to actual whistleblowers, on both legal and non-legal aspects of whistleblowing – including referrals to and funding for relevant legal, career, health and other personal support services.

Above: Human Rights Law Centre Secondee Lawyers Jade Tyrell and Massooma Saberi at a rally for whistleblowers.

3. Prevention

The WPA should help prevent adverse outcomes for public interest whistleblowers and their organisations through:

a. support and leadership of a **'no wrong doors' intake and referral approach** among integrity and regulatory agencies and organisations, including secure information channels for ongoing communication with whistleblowers,

b. **monitoring powers** in relation to handling of referred cases, helping ensure agencies and organisations fulfil their positive duties to support and protect whistleblowers, and

c. provision of **general information, guidance and training** on best practice whistleblower support and protection approaches for agencies and organisations, along with relevant continuing professional development for legal practitioners and tribunal members.

4. Remedies Focus

The WPA's central responsibility is to ensure remedial action in response to *prima facie* cases of detrimental treatment of whistleblowers. This is done in pursuit of the public interest in all persons being able to safely speak up about wrongdoing in, by or related to their organisation without undue risk or reprisal, and in line with a principle that whistleblowers should be left 'no worse off'.

In response to complaints, referrals, monitoring or on its own initiative, the WPA's remedial powers should include:

a. **preventative action** (e.g. injunctions) in relation to anticipated detrimental acts, omissions, failures to support, or agency non-compliance with disclosure-handling obligations, and

b. **investigation, reporting, recommendations and enforcement action** in respect of past detrimental treatment, including but not limited to direct or knowing reprisal.

The WPA would not investigate primary allegations of wrongdoing, except to the extent necessary to assess and/or refer cases for response or action by other agencies, or ensure appropriate investigations occur and that disclosures are resolved.

Reserve Bank foreign bribery whistleblowers Brian Hood & James Shelton.
Credit: Jason South/The Age

> “Even with the best legislation, there will always be organisations where people don’t feel comfortable using internal channels, and that’s what the whistleblower protection commissioner/ authority will do. It will provide them an avenue. At the moment, the ones who have lost faith in their organisations, they start kicking some rocks over to see whether or not they should raise concerns and there’s nowhere to go.”

— Dennis Gentilin, former banking fraud whistleblower - Evidence to the Parliamentary Joint Committee on Corporations and Financial Services, October 2023

5. Meditation & Administrative Redress

In support of its prevention and remedies focuses, the WPA should have power to conduct ‘early intervention’ **conciliation or mediation** of alleged/apparent detrimental treatment , and recommend informal and administrative remedies to resolve cases, where the whistleblower and organisation consent and where it is not contrary to the public interest to do so. The obligation of agencies and organisations to address primary allegations of wrongdoing would remain unaffected and not be a subject for conciliation or mediation.

Given the public interest in fairness and transparency in public interest whistleblowing outcomes, the WPA would retain power to initiate formal investigation and enforcement where informal resolution does not occur or is unsuccessful. Even where successful, the WPA would track all resolution outcomes for inclusion in its reporting in at least aggregate or deidentified form.

6. Legal Actions

The WPA should have a discretion to bring **civil (including employment) proceedings** for remedies, in the public interest, including on behalf of individual whistleblowers (with their consent). It would also have power to intervene in criminal or civil cases raising public interest whistleblower protection issues, and would be required to be consulted by any federal public agency proposing to take legal action against a whistleblower as to the reasonableness of that action.

Above: Award winning author and financial services expert Dennis Gentilin blew the whistle on banking fraud, highlighting the need for improved protections

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A multi-partisan group of politicians speak at the launchpeaks at the launch of the predecessor to this report, *Protecting Australia's Whistleblowers: The Federal Roadmap*

7. Rewards, Compensation, Financial Support

The WPA should have power to:

a. **seek financial remedies** on behalf of whistleblowers,

b. administer r**edress and reward schemes** based on a proportion of penalties, financial savings or other income derived by the Commonwealth as a result of whistleblower disclosures, and

c. seek **legal costs protection** for whistleblowers, including on a full indemnity basis, in appropriate cases.

8. Comprehensive, Seamless Jurisdiction

The WPA should ensure the efficiency and effectiveness of whistleblower protections by having jurisdiction to enforce protected disclosures **under any and all Commonwealth laws** (public sector, corporate, not-for-profit, union and sector-specific) – including to ensure whistleblowers do not 'fall through cracks' in protection, whether they are public servants, contractors, consultants, corporate or NGO employees or any other person working in a federally-regulated industry or sector who speaks up about wrongdoing in or by their own or a related organisation.

9. Adequate Powers & Resources

The WPA should have **all the powers necessary** to fulfil its functions, including to: compel evidence and information; issue guidance and recommendations; monitor progress on outcomes arising from disclosures; maintain confidential communications with whistleblowers and organisations; conduct reviews of the effectiveness of organisational policies, regulations and legislation; and report publicly on specific cases or general issues. The WPA should be appropriately **funded** to undertake its functions, overseen by a joint, multi-party parliamentary committee.

10. Independence

The WPA should be headed by an independent, suitably-qualified, specialised statutory officer (Whistleblower Protection Commissioner) supported by:

a. **security of tenure** equivalent to a judicial officer,

b. a **stand-alone budget** and dedicated body of staff, including those with personal experience of having blown the whistle, and

c. **statutory coordination and advisory committees,** including advice from civil society, employer, union and former whistleblower representatives.

Whistleblower Jeannie-Marie Blake gives evidence to the Robodebt royal commission

“I feel like the APS needs to have an independent authority that could investigate and help protect staff speaking out in the interest of the public that they serve. I strongly believe that if we had an independent body protecting staff, then more staff would be comfortable to speak out on issues that matter.

Currently, you are left weighing up whether you can live with the consequences of going on the record or live with the consequences for the public if you don’t speak out.”

— Jeannie-Marie Blake, former Robodebt whistleblower - interviewed in The Mandarin

Meeting International Standards

Transparency International's global *Best Practice Guide for Whistleblowing Legislation* (2018) describes the need for any country's 'whistleblowing authority' to have clear functions to:

1. Receive, investigate and address complaints of unfair treatments
2. Address improper investigations of whistleblower disclosures
3. Provide advice and support
4. Monitor and review whistleblowing frameworks
5. Publish data and undertake monitoring
6. Raise public awareness

It is time for Australia to catch up, and even again lead the way with effective institutions to support whistleblowers and oversee whistleblowing laws. In the United States, since 1989, the Office of Special Counsel (OSC) has been a whistleblower protection authority for American federal public sector whistleblowers – requiring agencies to investigate whistleblower disclosures, receiving and investigating complaints of reprisal, conciliating disputes between whistleblowers and agencies and intervening in significant whistleblower protection litigation.

The OSC has independence and security of tenure, with the Special Counsel appointed by the President with advice and consent from the Senate. The OSC has proven an effective actor in supporting public sector whistleblowers, working in collaboration with individual inspectors-general across different agencies. The OSC's work is complemented by the Office of the Whistleblower Ombuds in the United States House of Representatives, which helps congresspeople and committees in their dealings with whistleblowers, including through training and best-practice intake procedures.

Recently, there has been momentum in establishing whistleblowing offices in Europe, coinciding with passage of the *European Union Whistleblowing Directive*. In the Netherlands, the *Huis voor Klokkenluiders* (House of the Whistleblowers) was established in 2016 to oversee and enforce Dutch whistleblower protections. In Slovakia, the Slovak Republic Whistleblower Protection Office has a comprehensive range of functions including assisting during the whistleblowing process, intervening in retaliation cases (including issuing interim orders to pause impacts to a whistleblower's employment), directing disclosures to the appropriate body, supporting organisations in establishing internal whistleblower programs, and working to promote whistleblower protections across Slovakian society. Whistleblowing bodies with more limited functions have also been established in Ireland and Finland.

Every country, and every whistleblower protection regime is different – so there is no 'off the shelf' model for Australia. The draft design principles fill the gaps presently existing in the Australian whistleblowing context, informed by international standards and functions that have proven successful in other jurisdictions.

Above: Banking whistleblower Jeff Morris, whose courageous whistleblowing helped spark the banking royal commission.

Hon Tony Fitzgerald AC KC at the launch of the Whistleblower Project in Sydney.

What are the Gaps?

We know there is a general problem with the inaccessibility of current legal protections for whistleblowers – in terms of time, cost, and legal expertise needed to secure remedies if or when a whistleblower suffers from a lack of support or from unfair treatment, for having done the right thing and raised their concerns about wrongdoing.

But research shows there are also other gaps, despite the best efforts of existing agencies, like the Commonwealth Ombudsman and the Australian Securities and Investments Commission (ASIC), to try and make whistleblowing regimes work with the limited responsibilities and resources they have.

Figure 1, from Griffith University's submission to the Attorney-General's review of public sector whistleblower protections, summarises the different functions that are needed in a central oversight or implementation agency – and which ones are currently provided for, if at all, in our main federal whistleblowing laws.

The analysis confirms the whistleblower protection authority should be independent, sufficiently-resourced and operate in a manner that complements existing integrity bodies, with some functions migrated as required. A dedicated whistleblowing body will support existing investigative and regulatory agencies, such as the Ombudsman and ASIC, by allowing them to focus on their core responsibilities and supporting whistleblowers to engage effectively with them, as well as many other agencies.

A federal whistleblower protection authority would not enforce State laws – which are limited to the public sector – but would provide an important new precedent to help inform the strengthening of State institutional arrangements. A federal whistleblower protection authority could also play a significant role in cooperating with State bodies in the future to foster nationally consistent support and guidance, or even provide support to state and territory whistleblowers under intergovernmental agreements.

A wide range of federal whistleblowing reform across the public, private and non-profit sectors is anticipated in the immediate months and years ahead. Without a whistleblower protection authority, these reforms will be incomplete – but by taking this critical step to ensure these laws work in practice, not just on paper, we can make sure the previously unfulfilled democratic promise of all our federal whistleblowing laws finally becomes a reality.

Figure 1: Filling the Gaps

Current Institutional Roles in Whistleblowing Oversight

Key: Role largely provided for ✓ Substantial gap ✗ Total gap ✗

Roles needed		Description		Public sector	Private/ Not for profit sectors
Advisory	1	Awareness	General awareness-raising of importance of whistleblowing	✓	✗
	2	Training	Information, skill development, capacity-building, organisational standards	✓	✗
Support and protection	3	Psychosocial support	Access to personal/career coaching & mental health services	✗	✗
	4	Prevention	Early management intervention in higher risk matters	✗	✗
	5	Legal support	Access to free legal advice for whistleblowers	✗	✗
	6	Conciliation	Alternative dispute resolution or admin remedies for unfair treatment	✗	✗
Investigation	7	Wrongdoing	Investigation of alleged primary disclosure (wrongdoing)	✓	✓
	8	Detriment	Investigation of alleged detrimental/unfair treatment	✗	✗
	9	Reviews	Independent review of internal investigations	✗	✗
Adjudication	10	Corrective action	Ensuring primary wrongdoing is dealt with & sanctioned	✓	✓
	11	Protection remedies	Ensuring redress & compensation for unfair treatment	✗	✗
Institutional	12	Policy evaluation	Ongoing review of effectiveness of the regime	✗	✗
	13	Auditing	Systemic & individual reviews of organisation compliance	✗	✗
	14	Monitoring	Ongoing review of the implementation of the system	✗	✗
	15	Coordination	Strategic & operational coordination of roles across the system	✗	✗

(Source: Griffith University 2024)

Key References

1. Government Accountability Project and International Bar Association, *Are Whistleblowing Laws Working? A Global Study of Whistleblower Protection Litigation* (March 2021)

2. Griffith University, Human Rights Law Centre and Transparency International Australia, *Protecting Australia's Whistleblowers: The Federal Roadmap* (November 2022; updated January 2023)

3. Griffith University, Justice is Calling: Key Research Lessons for a *Fit-for-Purpose Commonwealth Whistleblowing Regime*, (J Olsen & A J Brown, Centre for Governance & Public Policy), Submission to the Attorney-General's Department, 'Public sector whistleblowing stage two reforms' (January 2024)

4. Human Rights Law Centre, *Cost of Courage: Fixing Australia's Whistleblower Protections* (August 2023)

5. Human Rights Law Centre, *Pathway to Protection*, Submission to the Attorney-General's Department, 'Public sector whistleblowing stage two reforms' (January 2024)

6. Parliamentary Joint Committee on Corporations and Financial Services, *Report: Whistleblower Protections* (September 2017)

7. Senate Select Committee on Public Interest Whistleblowing, *Report: In the Public Interest* (August 1994)

8. Transparency International Australia and Griffith University, *Australia's National Integrity System: The Blueprint for Reform* (November 2020)

9. Transparency International, *A Best Practice Guide for Whistleblowing Legislation* (March 2018)

10. Transparency International Australia, *Ensuring Australian Whistleblowing Laws Work*, Submission to the Attorney-General's Department, 'Public sector whistleblowing stage two reforms' (December 2023)

11. Transparency International, *Institutional Arrangements for Whistleblowing: Challenges and Best Practices* (April 2021)

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Human Rights Law Centre